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IN THE

Supreme Court of the United States

OCTOBER TERM, 1932

No. 377

ANGLO-CHILEAN NITRATE SALES CORPORATION,
Appellant,

against

THE STATE OF ALABAMA,
Appellee.

APPEAL FROM THE SUPREME COURT OF THE STATE OF ALABAMA

BRIEF FOR THE APPELLANT

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APPEAL FROM THE SUPREME COURT OF THE STATE OF ALABAMA

BRIEF FOR THE APPELLANT

This case comes before the Court on appeal from the Supreme Court of Alabama under Section 237 (a) of the Judicial Code of the United States, as amended (28 U. S. C. A. §344 [a]), and Section 1 of the Act of Congress of January 31, 1928 (c. 14, 45 Stat. 54), and involves a suit begun by appellant in the Circuit Court of Montgomery County, Alabama, in equity, to vacate a final assessment of a franchise tax made by the State Tax Commission of Alabama against the appellant for the year 1930. This Court, on November 21, 1932, noted probable jurisdiction.

Opinion Below

Supreme Court of Alabama, 142 Southern Reporter 87 (R. 26-36), not yet officially reported.

The Circuit Court of Montgomery County, Alabama, vacated the assessment (R. 21-22). The Supreme Court of Alabama reversed the decree of the Circuit Court of Montgomery County and directed a decree upholding the assessment (R. 26). An application for a rehearing was overruled (R. 38).

Question Presented

Is Section 54 of Act No. 163, approved July 22, 1927, Alabama General Acts, 1927, page 176, under which the tax involved in this suit was assessed against the appellant, as construed by the Supreme Court of Alabama in this case, unconstitutional and void as repugnant to Clause 2 of Section 10 of Article I and/or Section 8 of Article I of the Constitution of the United States?

The Statute Involved

Section 54 of Act No. 163, approved July 22, 1927, Alabama General Acts, 1927, page 176, provides as follows:

> "That every corporation organized under the laws of any other state, nation, or territory, and doing business in this state, except strictly benevolent, educational or religious corporations, shall pay annually to the state an annual franchise tax of two dollars ($2.00) on each one thousand dollars of the actual amount of capital employed in this State. In ascertaining the annual franchise tax which shall be paid by any foreign corporation doing business in this state under this section, there shall be deducted from the amount of the capital employed by such corporation in this state the aggregate amount of loans of money made by such corporations in this

state, and which shall be secured by existing mortgage or mortgages to it on real estate in this state, and upon which mortgages there shall have been paid the recording privilege tax provided by law."

Statement of Facts

The case was tried in the courts below upon an agreed statement of facts which appears at pages 16 to 20 of the record. These facts may be summarized as follows:

The appellant, Anglo-Chilean Nitrate Sales Corporation, is a New York corporation, having its principal office in the City of New York. It qualified to do business in the State of Alabama on October 10, 1927. Between that date and March 31, 1930 (the date on which the final assessment in question was made) appellant was engaged in the business of importing into the United States nitrate of soda from Chile, South America, through the Port of Mobile, Alabama, and other ports in the United States. Appellant sold and delivered such nitrate to customers both within and without the State of Alabama.

On December 31, 1929 (the date as of which the return was made) appellant had on hand 33,455,763 pounds of nitrate which had been imported by it into the United States from Chile and was stored in a public warehouse in the City of Mobile, Alabama. All of such nitrate, when imported into the United States through the Port of Mobile, was contained in bags, each bag containing approximately 100 pounds of nitrate. Such nitrate was stored in a public warehouse in such original bags and subsequently sold and delivered by appellant in the original bags in which it was imported. Between the date of importation and its sale and delivery by appellant, none of the nitrate had been re-

moved from the original bags, nor had the original bags at any time been broken into.

The nitrate was sold through a salesman in the State of Alabama who was compensated by commissions on his sales, and who paid his own operating expenses. All orders taken were subject to the approval of appellant's New York office, and no orders were effective until signed and approved by appellant in New York City. When such orders were accepted and approved, directions were then given by the home office to ship the nitrate to the customer in the original bags in which it was imported into the United States and stored in warehouse. Such directions were given to Walsh Stevedoring Company, Mobile, Alabama, an entirely independent contractor, which had an arrangement with appellant to handle the importation of the nitrate, store it in a public warehouse and forward it to the particular customer after a sale had been made by appellant.

All nitrate sold by appellant and delivered by it from the warehouse in Mobile, Alabama, between October 10, 1927 and March 31, 1930, was packed in Chile, shipped from Chile, and imported into the United States through the Port of Mobile, solely in the original bags.

Upon receipt from appellant's New York office of directions to ship nitrate in pursuance of a sale, the Walsh Stevedoring Company forwarded such nitrate to the ultimate consumer together with the bill of lading, the shipping documents being sent to the customer through the bank of collection nearest the customer. All transactions were for cash. The customer received the nitrate only when he took up the shipping documents through the local bank of collection by paying the draft for the purchase

price attached thereto. All funds received in payment were remitted by the local bank to the Merchants National Bank of Mobile, Alabama, and immediately forwarded by that Bank to appellant at New York City. Appellant maintained no bank account in Alabama, all expenses incurred in Alabama being paid from the New York office.

On December 31, 1929, appellant had no accounts or bills receivable in Alabama except during the brief interval while the funds in payment of the nitrate were being transmitted from the local bank through the Merchants National Bank of Mobile, Alabama. Other than nitrate, appellant did not own or employ any property in the State of Alabama and employed no capital in the State, unless the importation into the United States through the Port of Mobile, the storage in Mobile and the sale of the nitrate in the manner above described be considered capital employed in the State.

On March 14, 1930, appellant filed with the Tax Commission of the State of Alabama a return and written statement under oath as required by Section 58 of Act No. 163, Alabama General Acts, 1927, page 177, on blanks furnished by the State Tax Commission. In the return (R. 8) appeared the following:

> "18. Book value of property, both tangible and intangible, in Alabama not assessed for taxation in Alabama and not included in answering Questions 11 to 17 above: 33,455,763 lbs. (net weight) of nitrate imported into Alabama by corporation and in store there in original package, book value $712,846.72."

Upon this return the State Tax Commission, on March 31, 1930, made a final assessment of a tax on the franchise of appellant for the year 1930 in the amount of $1,425.69

(R. 4), being $2 for each $1,000 of the value of the nitrate referred to in the return.

From this assessment appellant appealed to the Circuit Court of Montgomery County, Alabama, in equity, which entered a decree adjudging, *inter alia*, that the assessment be vacated and annulled (R. 21-22).

The State thereupon appealed to the Supreme Court of Alabama, and on May 12, 1932, the Court entered a judgment reversing the decree of the Circuit Court of Montgomery County, and remanding the cause for a decree upholding the validity of the assessment (R. 26). On June 9, 1932, an application for a rehearing was overruled (R. 38).

The appellant thereupon appealed to this Court (R. 42).

Specification of Errors

The appellant contends that the Supreme Court of Alabama erred in the following particulars:

1. In holding that the above quoted statute, as construed by the Supreme Court of Alabama in this case, is not unconstitutional and void as repugnant to Clause 2 of Section 10 of Article I of the Constitution of the United States, in that it (a) levies a tax on goods imported by appellant from a foreign country and maintained in Alabama in the original package; (b) levies a tax upon the right of appellant to sell in the original package goods imported by it from a foreign country, and measures the tax by the amount of property of appellant in the State of Alabama, which property consists solely of nitrate of soda imported by appellant from Chile, South America, and held by it in the original package; and (c) levies a corporate franchise tax upon appellant for the privilege of en-

gaging exclusively in the business of selling in the original packages goods imported by it from a foreign country.

2. In holding that the aforesaid statute, as construed by the Supreme Court of Alabama in this case, is not unconstitutional and void as repugnant to Section 8 of Article I of the Constitution of the United States, in that it (a) levies a tax upon the right of appellant to carry on foreign commerce in the State of Alabama, and measures such tax by the amount of property of appellant in the State, which property consists solely of nitrate of soda imported by appellant from Chile, South America, and held by it in the original package; and (b) levies a corporate franchise tax upon appellant for the privilege of engaging exclusively in foreign commerce in the State of Alabama.

Summary of Argument

I.

It is well settled that the Constitutional prohibition against states laying duties on imports extends to the occupation of the importer and the act of selling the imports (*Brown* v. *Maryland,* 12 Wheat. 419 [1827]; *Willcuts* v. *Bunn,* 282 U. S. 216, 228 [1931]). The sole business of appellant in the State of Alabama consisted of the sale in the original package of nitrate imported by appellant from abroad. Appellant had no property within the State except a stock of nitrate in a public warehouse, which nitrate at all times was retained in the original bags in which it was imported. Thus appellant did no local business within the State and had no capital employed there unless the nitrate be considered such. The State is therefore without power to levy a tax upon appellant for the privilege

of engaging exclusively in the business of selling in the original package the nitrate imported by it (*Alpha Cement Co.* v. *Massachusetts*, 268 U. S. 203 [1925]; *Ozark Pipe Line Corporation* v. *Monier*, 266 U. S. 555 [1925]; *Cheney Brothers Co.* v. *Massachusetts*, 246 U. S. 147 [1918]).

II.

Although we submit that the foregoing is decisive of this case, appellant contends that even if it were true that the State had power to levy a franchise tax in some amount against appellant, such tax could not be measured by the value of the nitrate imported by appellant from a foreign country and held by it in the original package. The tax now sought to be imposed is measured solely by property admittedly immune from taxation and no attempt has been made in the tax scheme to separate local business from foreign commerce. The necessary effect of the statute in question, as construed by the Court below, is to require appellant to purchase from the State of Alabama the privilege of selling the imported nitrate which has been guaranteed it by the Constitution and to pay for such privilege a tax measured solely by the imports on hand for sale. It is submitted, therefore, that the measure adopted for the purpose of determining the amount of the tax is such as in reality to impose a burden on foreign commerce (*Western Union Telegraph Co.* v. *Kansas*, 216 U. S. 1 [1910]; *Looney* v. *Crane Co.*, 245 U. S. 178 [1917]; *International Paper Co.* v. *Massachusetts*, 246 U. S. 135 [1918]; *Cudahy Packing Co.* v. *Hinkle*, 278 U. S. 460 [1929]; *Ozark Pipe Line Corporation* v. *Monier*, 266 U. S. 555, 563, *supra*; *Alpha Cement Co.* v. *Massachusetts*, 268 U. S. 203, 218, *supra*; *East Ohio Gas Co.* v. *Tax Commission*, 283 U. S. 465, 470 [1931]).

ARGUMENT

I.

The State of Alabama is without power to levy a tax upon appellant for the privilege of selling in the original package goods imported by appellant from a foreign country.

The Supreme Court of Alabama has recognized that the tax now sought to be imposed is one upon the privilege or right to do business within the State. Thus, in *State* v. *National Cash Credit Association,* 141 So. 541 (1932) the Court said with reference to the statute in question (p. 545):

> "We merely hold a franchise tax to be what it purports to be, a tax upon the exercise or use of its franchise in Alabama for the purposes of such franchise; and that, if no corporate activity is conducted in Alabama during the period covered by the tax, the corporation does not owe a franchise tax."

The appellant contends that the statute in question, as construed by the Court below in this case, violates both the imports and commerce clauses of the Constitution of the United States, because it levies a tax upon the appellant for the privilege of selling in the original package goods imported by appellant from abroad and for the privilege of engaging exclusively in foreign commerce in the State of Alabama. The relevant Constitutional provisions will be discussed together, since, as was said by Mr. Justice Pitney in *Crew Levick Co.* v. *Pennsylvania,* 245 U. S. 292 (1917), at page 295:

> "The bare question, then, is whether a state tax imposed upon the business of selling goods in foreign

commerce, in so far as it is measured by the gross receipts from merchandise shipped to foreign countries, is in effect a regulation of foreign commerce or an impost upon exports, within the meaning of the pertinent clauses of the Federal Constitution. *Although dual in form, the question may be treated as a single one, since it is obvious that, for the purposes of this case, an impost upon exports and a regulation of foreign commerce may be regarded as interchangeable terms.* And there is no suggestion that the tax is limited to the necessities of inspection, or that the consent of Congress has been given." (Italics ours.)

A. The Constitutional prohibition against states laying duties on imports extends to the occupation of the importer and the act of selling the imports.

The relevant part of Clause 2 of Section 10 of Article I of the Constitution of the United States reads as follows:

> "No State shall without the consent of the Congress lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws; and the net produce of all duties and imposts laid by any State on imports or exports shall be for the use of the Treasury of the United States; and all such laws shall be subject to the revision and control of the Congress."

It has been settled law since the case of *Brown* v. *Maryland,* 12 Wheat. 419, was decided by this Court in 1827, that not only are the States forbidden to levy a property tax upon goods which have not lost their character as imports, but they are also prohibited from burdening by taxation the right of the importer to sell his imports, and that the right to sell is a necessary incident of the right to import.

In *Brown* v. *Maryland, supra,* there was involved a license tax of $50, imposed by the State of Maryland on "all importers of foreign articles or commodities * * * by bale or package." In holding this tax in violation of both the imports and commerce clauses of the Constitution, Mr. Chief Justice Marshall said (p. 444):

> "All must perceive, that a tax on the sale of an article, imported only for sale, is a tax on the article itself. It is true, the state may tax occupations generally, but this tax must be paid by those who employ the individual, or is a tax on his business. The lawyer, the physician, or the mechanic, must either charge more on the article in which he deals, or the thing itself is taxed through his person. This the state has a right to do, because no constitutional prohibition extends to it. So, a tax on the occupation of an importer is, in like manner, a tax on importation. It must add to the price of the article, and be paid by the consumer, or by the importer himself, in like manner as a direct duty on the article itself would be made. This the state has not a right to do, because it is prohibited by the constitution."

The far reaching doctrine laid down in this case has been reaffirmed in numerous later decisions, the most recent of which is *Willcuts* v. *Bunn,* 282 U. S. 216 (1931), where Mr. Chief Justice Hughes, speaking for the Court, said (p. 228):

> "When the Constitution prohibits States from laying duties on imports, the prohibition not only extends to a tax upon the act of importing, but also to one upon the occupation of the importer or upon the articles imported. A tax on the sale of an article, imported only for sale, is a tax on the article itself. *Brown* v. *Maryland,* 12 Wheat. 419, 444. Similarly,

> with respect to federal taxation of articles exported from any State, the constitutional inhibition gives immunity to the process of exportation and to the transactions and documents embraced in that process. *Fairbank* v. *United States,* 181 U. S. 283; *United States* v. *Hvoslef,* 237 U. S. 1; *Thames & Mersey Marine Insurance Company* v. *United States,* 237 U. S. 19. Only on that construction can the constitutional safeguard be maintained."

In *Cook* v. *Pennsylvania,* 97 U. S. 566 (1878), it was held that a tax on the amount of sales made by an auctioneer was in effect a tax on the goods sold, and therefore in violation of the imports and commerce clauses of the Constitution when applied to sales of imported goods in the original package. Mr. Justice Miller, in delivering the opinion of the Court, said (pp. 570-571):

> "But it is argued that the authority of the auctioneer to make any sales is derived from the State, and that the State can, therefore, impose upon him a tax for the privilege conferred, and that the mode adopted by the statute of measuring that tax is within the power of the State. That being a tax on him for the right or privilege to sell at auction, it is not a tax on the article sold, but the amount of the sales made by him is made the measure of the tax on that privilege. In support of this view, it is said that that the importer could himself have made sale of his goods without subjecting the sale to the tax. The argument is fallacious, because without an auctioneer's license he could not have sold at auction even his own goods. If he had procured, or could have procured, a license, he would then have been subject by the statute to the tax, for it makes no exception. By the express language of the statute, the auctioneer is to collect this tax and pay it into

> the treasury. From whom is he to collect it if not from the owner of the goods? If the tax was intended to be levied on the auctioneer, he would not have been required first to collect it and then pay it over. It was, then, a tax on the privilege of selling foreign goods at auction, for such goods could only be sold at auction by paying the tax on the amount of the sales."

It will be noted that in the case cited, just as in the present case, it was argued that the authority of the appellant to make sales was derived from the state and was therefore subject to taxation. Nevertheless the Court held that the state could not impose a tax for the privilege of selling the imported goods.

See also: *May* v. *New Orleans,* 178 U. S. 496 (1900);
Fairbank v. *United States,* 181 U. S. 283 (1901);
Almy v. *California,* 24 How. 169 (1860);
Selliger v. *Kentucky,* 213 U. S. 200 (1909);
United States v. *Hvoslef,* 237 U. S. 1 (1915);
Thames & Mersey Marine Insurance Co. v. *United States,* 237 U. S. 19 (1915);
Crew Levick Co. v. *Pennsylvania,* 245 U. S. 292, *supra.*

It must therefore be regarded as settled that any tax whatever is invalid if it interferes with the right of the importer freely to dispose of the goods imported by him, and denies to him "the right of using the privilege which he has purchased from the United States until he shall have also purchased it from the state" (12 Wheat. at page 442).

B. A state has no power to levy a tax upon a foreign corporation for the privilege of engaging exclusively in the business of selling in the original package goods imported by it from a foreign country.

We have just seen that a tax upon an importer for the privilege of selling in the original package goods imported by him is in substance and effect a tax upon such imported goods. Thus a state may not, under the Constitution, impose such a tax.

In *Brown* v. *Maryland, supra,* the importers were individuals, but it is submitted that the doctrine of that case applies equally to corporations. It is well settled that interstate and foreign commerce carried on by corporations is entitled to the same protection against state exaction which is given to such commerce when carried on by individuals.

> *Gloucester Ferry Company* v. *Pennsylvania,* 114 U. S. 196 (1885);
> *Philadelphia & Southern Steamship Company* v. *Pennsylvania,* 122 U. S. 326, 342 (1887).

There can be no question that the same is true in cases arising under the imports clause of the Constitution. Thus in *Crew Levick Co.* v. *Pennsylvania,* 245 U. S. 292, *supra,* a corporation was involved, yet it was held that both of the constitutional provisions now in question had been infringed.

A situation parallel to that in the present case may be found in the cases involving the right of a state to impose a tax upon a foreign corporation engaged exclusively in interstate commerce for the privilege or right to do busi-

ness in the state. It is now settled that in such cases a tax may not constitutionally be imposed.

Alpha Cement Co. v. *Massachusetts,* 268 U. S. 203 (1925);

Ozark Pipe Line Corporation v. *Monier,* 266 U. S. 555 (1925);

Cheney Brothers Co. v. *Massachusetts,* 246 U. S. 147 (1918).

See also: *Western Union Telegraph Co.* v. *Kansas,* 216 U. S. 1 (1910).

The *Ozark Pipe Line Corporation* case involved a Missouri statute which required every foreign corporation engaged in business in the State to pay an annual franchise tax based on the "par value of its capital stock and surplus employed in business" in the State. The statute was thus very similar to the one involved in the present case. The corporation was engaged exclusively in the operation of a pipe line for transporting petroleum through the State in interstate commerce, although it owned other property and maintained its principal office in Missouri.

The Court held the tax unconstitutional as a burden on interstate commerce, saying, per Mr. Justice Sutherland (p. 562):

> "The tax is one upon the privilege or right to do business, *State ex rel.* v. *State Tax Commission,* 282 Mo. 213, 234; and if appellant is engaged only in interstate commerce it is conceded, as it must be, that the tax, so far as appellant is concerned, constitutionally cannot be imposed. It long has been settled that a State cannot lay a tax on interstate commerce in any form, whether on the transportation of subjects of commerce, the receipts derived

> therefrom, or the occupation or business of carrying it on. *Leloup* v. *Port of Mobile,* 127 U. S. 640, 648; *Kansas City Ry. Co.* v. *Kansas,* 240 U. S. 227, 231, and cases cited. Plainly, the operation of appellant's pipe line is interstate commerce and beyond the power of State taxation."

In answer to the contention that the corporation was also engaged in doing local business and was therefore subject to taxation, the Court said (p. 565):

> "The business actually carried on by appellant was exclusively in interstate commerce. The maintenance of an office, the purchase of supplies, employment of labor, maintenance and operation of telephone and telegraph lines and automobiles, and appellant's other acts within the State, were all exclusively in furtherance of its interstate business; and the property itself, however extensive or of whatever character, was likewise devoted only to that end. They were the means and instrumentalities by which that business was done and in no proper sense constituted, or contributed to, the doing of a local business. The protection against imposition of burdens upon the interstate commerce is practical and substantial and extends to whatever is necessary to the complete enjoyment of the right protected."

In the present case, the appellant had no property in the State of Alabama except the imported nitrate and possibly funds in payment for nitrate sold in the course of being transmitted from the local bank to the Merchants National Bank of Mobile and by that bank to New York. This was recognized by the Court below in its opinion when it said (R. 35):

> "The Tax Commission based the assessment upon the value of the nitrate on hand and in storage in

> Alabama on December 31, 1929, amounting in value to $712,846.72, with nitrate on hand outside of Alabama of the value of five million dollars."

Thus appellant had no capital employed within the State unless such nitrate be considered capital so employed. The nitrate was sold through orders taken by a salesman in the State and no order was effective until signed and approved by appellant in New York City. The salesman was compensated by commissions on his sales. He paid his own operating expenses. Under these circumstances it is plain that appellant did no local business and was engaged exclusively in selling the imported nitrate. The present case is therefore clearly within the rule of the *Ozark Pipe Line Corporation* case and similar cases.

It is also important to bear in mind that in the cases cited above the result noted was reached under the commerce clause of the Constitution, and accordingly it was necessary to determine that the tax regulated or imposed a burden upon interstate or foreign commerce. We submit that the present case is an *a fortiori* case when compared with the interstate commerce cases, for the reason that the Constitutional protection given to the import business is even greater than that given to interstate commerce. The distinction is that the immunity conferred by the imports clause of the Constitution attaches to the import itself before sale, while the immunity in case of an article because of its relation to interstate commerce depends on whether the tax challenged regulates or burdens interstate commerce.

For example, in cases which sustain an occupation or privilege tax the amount of which is based on sales of original packages of goods received in interstate commerce,

it is pointed out that the decision would be otherwise if the goods had been imported from abroad.

Sonneborn Bros. v. *Cureton,* 262 U. S. 506 (1923);
American Steel & Wire Co. v. *Speed,* 192 U. S. 500 (1904).

In *Sonneborn Bros.* v. *Cureton, supra,* there was involved an occupation tax imposed by the State of Texas on all wholesale dealers in oil, as applied to local sales, in original packages, of oil shipped into the State and stored there as stock in trade. It was argued on behalf of the taxpayer that goods brought from another state and held for sale in the original package were entitled to the same immunity as goods imported from abroad. The Court dismissed this contention, saying, per Mr. Chief Justice Taft (p. 510):

> "Cases subsequent to *Brown* v. *Maryland* show that the analogy between imports and articles in original packages in interstate commerce in respect of immunity from taxation fails. The distinction is that the immunity attaches to the import itself before sale, while the immunity in case of an article because of its relation to interstate commerce depends on the question whether the tax challenged regulates or burdens interstate commerce."

In *American Steel & Wire Co.* v. *Speed, supra,* there was involved a so-called general merchants' tax and a merchants' privilege tax, levied by the State of Tennessee, as applied to goods manufactured in another state and stored in a warehouse in Tennessee in the original packages, so as to be available for ready distribution to customers in

Tennessee and other states. In upholding the tax, the Court distinguished between goods brought in from another state and held in the original package and imports from abroad, saying, per Mr. Justice White (pp. 519-520):

> "Assuming that the goods concerning which the state taxes in this case were levied were in the original packages and had not been sold, if the bringing of the goods into Tennessee from another State constituted an importation, in the constitutional signification of that word, it is clear they could not be *directly or indirectly* taxed. But the goods not having been brought from abroad, they were not imported in the legal sense and were subject to state taxation after they had reached their destination and whilst held in the State for sale." (Italics ours.)

The clear implication of these cases is that, if the goods involved had been imports from abroad, as they are in the present case, the tax in each case would have been held invalid.

It may be urged on behalf of the State that since the tax in the present case is not measured by the total sales of nitrate made in Alabama during the year in question but by the value of the stock of nitrate on hand in the State on the tax day, no tax is in fact being levied against the imports, or upon the right to sell them. It is submitted that this contention mistakes the real point at issue. We shall discuss under Point II below the question whether, assuming for the purpose of argument that a tax in some amount might be levied against appellant, the tax might properly be measured by the value of the imports on hand on the tax day, but our contention is that any tax, however measured, has the effect of compelling the appellant to purchase a right guaranteed to it by the Constitution, namely,

the right to dispose of the goods imported by it and held in the original package. When the subject may not be taxed, the amount of the tax or the method by which it is measured is immaterial.

Thus, in *Alpha Cement Co.* v. *Massachusetts,* 268 U. S. 203, *supra,* a case involving the power of a state to impose an excise tax on a foreign corporation engaged solely in interstate commerce, the Court, per Mr. Justice McReynolds, said (p. 218):

> "The amount demanded is unimportant when there is no legitimate basis for the tax."

Nor is this a case of a state imposing a tax on a domestic corporation for the privilege of being a corporation (see, for example, *Kansas City, F. S. & M. R. Co.* v. *Botkin,* 240 U. S. 227 [1916], and *Kansas City &c. R. R. Co.* v. *Stiles,* 242 U. S. 111 [1916], both cited by the Court below); it is an attempt by a state to impose a tax on a foreign corporation for the privilege of selling in the state in the original package goods imported by such corporation from abroad.

We submit, therefore, that the State of Alabama is without power, under the Constitution, to impose the tax involved in the present case.

C. The case of *New York State* v. *Roberts,* 171 U. S. 658 (1898), is not contrary to appellant's contentions herein.

It may be urged that the decision of this Court in *New York State* v. *Roberts,* 171 U. S. 658, is an authority in favor of the validity of the tax in the present case. Much reliance was placed on that case in the opinion of the Court below and for that reason we shall consider it carefully.

The *Roberts* case involved a statute imposing an annual franchise tax, applicable to both domestic and foreign corporations, based upon the amount of capital stock employed in the State of New York and graded according to the annual dividends of the corporation. By its terms the statute was inapplicable to manufacturing corporations engaged in manufacturing wholly within the State. Parke, Davis & Co., a Michigan corporation, had established a branch office in New York from which it sold and distributed drugs of its own manufacture and also imported crude drugs which in a large part were sent to its Detroit factory for use but some of which were sold in the original packages in New York. The corporation employed in New York a force of over fifty persons, had business fixtures valued at $15,000, and an average stock of goods sent from Michigan and carried in New York during the years in question of about $50,000. It also employed in New York during that period a continuing capital of from $23,000 to $62,000 per year used in the purchase and sale of crude drugs.

The principal contention made on behalf of the corporation was that, being a manufacturing corporation, it was exempt from the tax and that if the statute were otherwise construed it was unconstitutional as an unjust discrimination against foreign manufacturing corporations and in favor of those having their factories in New York. It was also urged, however, that the capital employed in the importation and sale of crude drugs should not have been taken into account in determining the amount of capital employed within the State.

The Court, two justices dissenting, sustained the tax, holding there was no purpose disclosed in the statute either to distinguish between New York corporations and those

of other states to the detriment of the latter, or to subject property out of the State to taxation. In rejecting the contention that the capital employed in the importation and sale of crude drugs should not have been taken into account, the Court, per Mr. Justice Shiras, said (p. 664):

> "Again, it is said that, even assuming that the importation of crude drugs and their sale in the original packages constituted a portion of the corporate business, no tax could be imposed by the State under the doctrine of *Brown* v. *Maryland*, 12 Wheat. 419.
>
> "But that case is inapplicable. Here no tax is sought to be imposed directly on imported articles or on their sale. This is a tax imposed on the business of a corporation, consisting in the storage and distribution of various kinds of goods, some products of their own manufacture and some imported articles. From the very nature of the tax, being laid as a tax upon the franchise of doing business as a corporation, it cannot be affected in any way by the character of the property in which its capital stock is invested."

It is apparent from the foregoing statement of the *Roberts* case that it is distinguishable from the present case. In the first place, Parke, Davis & Co. were admittedly doing a local business in the State of New York entirely apart from the importing and reselling of crude drugs in the original package. Except for the question of unjust discrimination, therefore, the State had the right to levy a franchise tax in some amount.

Thus the only question for the Court was whether the measure of the tax was proper. This question we shall discuss below (pp. 31-37), but we emphasize that it does not arise in the present case, since here, contrary to the fact in the

Roberts case, appellant did no business whatever in the State of Alabama except that incident to the selling of the imported nitrate in the original package.

The *Roberts* case is distinguishable from the present case for another reason. The New York tax in question was graded according to the annual dividends paid by the corporation and was therefore to a considerable extent dependent on net profits. In the present case the tax is measured, not by net income, but by the value of the imports on hand on the tax day. The burden is therefore direct and not merely incidental. It is well settled that a tax measured by net income may be sustained under circumstances where a similar tax measured by gross receipts would be invalid. See, for example, *United States Glue Company* v. *Oak Creek*, 247 U. S. 321 (1918), where the Court, per Mr. Justice Pitney, said (p. 328):

> "The difference in effect between a tax measured by gross receipts and one measured by net income, recognized by our decisions, is manifest and substantial, and it affords a convenient and workable basis of distinction between a direct and immediate burden upon the business affected and a charge that is only indirect and incidental. A tax upon gross receipts affects each transaction in proportion to its magnitude and irrespective of whether it is profitable or otherwise. Conceivably it may be sufficient to make the difference between profit and loss, or to so diminish the profit as to impede or discourage the conduct of the commerce. A tax upon the net profits has not the same deterrent effect, since it does not arise at all unless a gain is shown over and above expenses and losses, and the tax cannot be heavy unless the profits are large. Such a tax, when imposed upon net income from whatever source arising, is but a

> method of distributing the cost of government, like a tax upon property, or upon franchises treated as property; and if there be no discrimination against interstate commerce, either in the admeasurement of the tax or in the means adopted for enforcing it, it constitutes one of the ordinary and general burdens of government, from which persons and corporations otherwise subject to the jurisdiction of the States are not exempted by the Federal Constitution because they happen to be engaged in commerce among the States."

While not measured by gross receipts, the tax in the present case, measured solely by the value of the imports, conceivably, as stated in the above quotation, may be sufficient to make the difference between profit and loss or to diminish the profit so as to impede or discourage the conduct of the commerce.

Moreover, it is submitted that some of the language from the *Roberts* case quoted above, if given the effect given it in the opinion of the Court below, is inconsistent with later decisions of this Court. For example, it is said (171 U. S., at p. 664):

> "Here no tax is sought to be imposed *directly* on imported articles or on their sale." (Italics ours.)

It clearly appears from the cases discussed above at pages 10 to 13 that a tax may not be imposed on imports either directly or *indirectly*.

Also, the Court said in the *Roberts* case (p. 664):

> "From the very nature of the tax, being laid as a tax upon the franchise of doing business as a corporation, it cannot be affected in any way by the character of the property in which its capital stock is invested."

Passing for the moment the question of its accuracy, this language assumes, as was true in that case, that a franchise tax in some amount might be imposed and that the only question was as to the measurement of the tax. In the present case, however, the privilege or franchise to engage in the business of selling in the original package the nitrate imported by appellant is not a proper subject of taxation by the State; no tax, however measured, may be imposed.

Further, we have the distinction made in the opinion in the *Roberts* case and adopted by the Court below in the present case when it said (R. 31-32):

> "The cases relied upon by appellee (*Ozark Pipe Corporation* v. *Monier*, U. S. Supreme Court, 69 Law Ed. 439; *Postal Telegraph Co.* v. *Adams*, 155 U. S. 688; *Western Union Tel. Co.* v. *Kansas*, 216 U. S. 1; *Galveston H. & S. A. R. Co.* v. *Texas*, 52 Law Ed. 1031) involved the question of undue burden upon interstate commerce, immunity of which from state interference has been zealously guarded by our federal decisions (*Western Union Tel. Co.* v. *Kansas, supra*), and concerning which the court has expressed difficulty in prescribing a satisfactory rule, and as to which a distinction has also been made between corporations organized to carry on interstate commerce, and having a quasi public character, and corporations organized to conduct strictly private business. *New York* v. *Roberts, supra.*"

It is respectfully submitted that this distinction is unsound for the reason that it is now settled that a state may not impose a tax which has the effect of burdening interstate or foreign commerce, whether the corporation

has a quasi-public character or is organized to conduct a strictly private business.

International Paper Co. v. *Massachusetts,* 246 U. S. 135, 142 (1918).

Finally, it is no longer true, as was assumed by the Court in the *Roberts* case and by the Court below, that a state may impose such conditions as it may judge expedient upon permitting a foreign corporation (other than one having a quasi-public character) to do business within its limits. If the corporation is doing an interstate as well as a local business and the measure adopted for determining the amount of a tax on the privilege of doing local business is such as in reality to impose a burden on interstate commerce, that measure cannot be constitutionally applied. The power to burden interstate commerce does not exist merely because of the general power of the state to exclude a corporation from doing local business.

Western Union Telegraph Co. v. *Kansas,* 216 U. S. 1, *supra;*

Looney v. *Crane Co.,* 245 U. S. 178 (1917);

International Paper Co. v. *Massachusetts,* 246 U. S. 135, *supra;*

Cudahy Packing Co. v. *Hinkle,* 278 U. S. 460 (1929).

See also: *Ozark Pipe Line Corporation* v. *Monier,* 266 U. S. 555, 563, *supra;*

Alpha Cement Co. v. *Massachusetts,* 268 U. S. 203, 218, *supra;*

East Ohio Gas Co. v. *Tax Commission,* 283 U. S. 465, 470 (1931).

Plainly, no attempt has been made in the present case to separate local business from that of selling in the original package the imported nitrate. To do so obviously would have resulted in no tax being imposed, since there was no local business to tax.

In conclusion on this point, let us refer briefly to the cases of *Paul* v. *Virginia,* 8 Wall. 168 (1868), *Home Insurance Co.* v. *New York,* 134 U. S. 594 (1890), and *Horn Silver Mining Co.* v. *New York,* 143 U. S. 305 (1892), cited in the *Roberts* case to sustain the tax there in question.

In *Paul* v. *Virginia, supra,* this Court sustained the power of a state to exclude foreign insurance companies from its limits, or to impose conditions upon their entering the state for purposes of their business, holding, *inter alia,* that issuing a policy of insurance was not a transaction of commerce within the meaning of the commerce clause of the Constitution. The case is therefore clearly distinguishable on its facts from the present case and it is submitted that the statement from the case quoted in the opinion of the Court below (R. 28) must be read with such facts in mind.

The *Horn Silver Mining Co.* case involved a tax imposed by the State of New York on the "corporate franchise or business" of domestic and foreign corporations. The tax, as applied to a foreign corporation doing business in the State, was upheld, although measured by the entire capital stock of the corporation, which was only partially employed in New York. Passing the question whether, under later decisions of this Court, the method of measuring the tax might not be objectionable, it is clear that the case is distinguishable from the present case. Admittedly, the Horn Silver Mining Co. was doing a local business in New York

and was therefore subject to a franchise tax. As in the *Roberts* case, the only question was as to the measure of the tax.

The *Home Insurance Co.* case is cited by the Court below for the proposition that "an excise tax may properly be measured by tax immune property" and there is quoted in its opinion a statement from the case to the effect that the validity of the tax can in *no way* be dependent upon the mode which the state may deem fit in fixing the amount for any year which it will exact for the franchise (R. 29). The actual decision in the case, however, was that the New York statute involved in the *Horn Silver Mining Co.* case, as applied to a *domestic* corporation, was valid, although the tax was measured *in part* by capital stock invested in United States bonds. We have pointed out above (p. 20) that cases involving the power of a state to tax domestic corporations are not in point in the present case and in any event it is submitted that, in view of more recent decisions of this Court, the case is no longer authority for the proposition that the validity of a tax depends solely on the *subject* on which it is levied and in no way on the *measure* by which its amount is determined.

It therefore appears that the *Roberts* case is clearly distinguishable from the present case and that in any event the entire trend of franchise tax cases in this Court since the *Roberts* case is opposed to the reasoning in that case relied on by the Court below to sustain the tax now in question.

D. The fact that appellant qualified to do business in the State of Alabama does not indicate it was doing a local business so as to entitle the State to impose a franchise tax.

It may be urged on behalf of the State that when appellant qualified to do business in Alabama, it subjected itself to the imposition of a franchise tax. It is submitted that this is entirely immaterial because even if appellant did an unnecessary act, even if it could have come into the State of Alabama without the consent or license of the State, this fact would have no bearing whatever upon the power of the State to levy the tax in question. The question is one of fact, namely, was the appellant engaged only in the business of selling goods in the original package which it had imported? The entrance fee is payable only once, and appellant might well have paid it rather than engage in controversy regarding the matter.

This precise question was answered by this Court in *Ozark Pipe Line Corporation* v. *Monier*, 266 U. S. 555, *supra*, when Mr. Justice Sutherland, speaking for the Court, said at page 567:

> "Nor is it material that appellant applied for and received a Missouri license or that it had the power thereunder to exercise the right of eminent domain. These facts could not have the effect of conferring upon the State an authority, denied by the Federal Constitution, to regulate interstate commerce. The State has no such power even in the case of domestic corporations. See *Philadelphia S. S. Co.* v. *Pennsylvania*, 122 U. S. 326, 342. The statute as applied to appellant is unconstitutional."

It is clear that the foregoing decision is conclusive of the point now in question.

E. There can be no question that the nitrate here involved constitutes imports in the original package within the rule of *Brown* v. *Maryland* and subsequent cases.

We refer to this question only because of the following statement in the opinion of the Court below (R. 33-34):

> "The nitrate is shown to have been imported from Chile in one hundred pound sacks, and that is the form in which it was sold. We are not prepared to concede that the doctrine of 'original package' cases would be extended to embrace importation of goods as to which the method of shipment was likewise the method of sale; and we interpret some of the reasoning of the opinion in *May* v. *New Orleans, supra,* as tending to this view. Certainly such an interpretation of the Constitution would at least have a tendency to encourage merchants and traders seeking to avoid state and local taxation, to import from abroad their merchandise in original salable packages."

It is respectfully submitted that this dictum is entirely unsound and that a more appropriate case than the present for the application of the original package doctrine could scarcely be conceived. In *May* v. *New Orleans,* 178 U. S. 496, *supra,* this Court held that the term "original package" meant the package in which the goods were received by the importer, saying, per Mr. Justice Harlan, at pages 508-9:

> "In our judgment, the 'original package' in the present case was the box or case in which the goods imported were shipped, and when the box or case was opened for the sale or delivery of the separate parcels contained in it, each parcel of the goods lost

> its distinctive character as an import, and became property subject to taxation by the State as other like property situated within its limits * * *."

Surely it cannot be said that merely because in the present case the natural and convenient unit of one hundred pounds is suitable for both the importation and the sale of nitrate, the importer is to be deprived of the immunity from taxation which the Constitution affords to his goods and his right to sell them. The present case cannot reasonably be said to be at all comparable to cases such as *Austin* v. *Tennessee*, 179 U. S. 343 (1900), and *Cook* v. *Marshall County*, 196 U. S. 261 (1905), where the goods in question (cigarettes) were shipped in an obviously unnatural manner. Cf. *Kirmeyer* v. *Kansas*, 236 U. S. 568 (1915).

We submit, therefore, that there can be no question that the nitrate here involved constitutes imports in the original package within the rule of *Brown* v. *Maryland* and subsequent cases.

II.

Even if it were true that the State had power to levy a franchise tax against appellant, such tax could not be measured by the value of goods imported by appellant from a foreign country and held by it in the original package.

We have endeavored to show above that the State of Alabama is without power to levy any tax against appellant for the reason that appellant is engaged exclusively in the business of selling in the original package goods im-

and was therefore subject to a franchise tax. As in the *Roberts* case, the only question was as to the measure of the tax.

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> its distinctive character as an import, and became property subject to taxation by the State as other like property situated within its limits * * *."

Surely it cannot be said that merely because in the present case the natural and convenient unit of one hundred pounds is suitable for both the importation and the sale of nitrate, the importer is to be deprived of the immunity from taxation which the Constitution affords to his goods and his right to sell them. The present case cannot reasonably be said to be at all comparable to cases such as *Austin* v. *Tennessee*, 179 U. S. 343 (1900), and *Cook* v. *Marshall County*, 196 U. S. 261 (1905), where the goods in question (cigarettes) were shipped in an obviously unnatural manner. Cf. *Kirmeyer* v. *Kansas*, 236 U. S. 568 (1915).

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II.

Even if it were true that the State had power to levy a franchise tax against appellant, such tax could not be measured by the value of goods imported by appellant from a foreign country and held by it in the original package.

We have endeavored to show above that the State of Alabama is without power to levy any tax against appellant for the reason that appellant is engaged exclusively in the business of selling in the original package goods im-

ported by it from abroad, all its activities in the State being incidental to such business. The Court below paid little attention to this contention, however, and the major portion of its opinion is concerned with the question of measurement of the tax. Therefore, we deem it necessary to discuss it here. Relying on *Educational Films Corporation* v. *Ward*, 282 U. S. 379 (1931), *Flint* v. *Stone Tracy Co.*, 220 U. S. 107 (1911), and similar cases, the Court below concluded that the tax now in question was not objectionable although it was measured by tax-immune property. The Court said (R. 27):

> "But we think the argument stresses too far the inhibition against state taxation of imports found in our Federal Constitution and overlooks the nature of the tax here in question. * * * The franchise tax here imposed applies alike to all foreign corporations engaged in business in this state. It makes no reference to imports, which are here involved solely because of the business in which the corporation was engaged."

We are not attempting to question the rule laid down in *Flint* v. *Stone Tracy Co., supra*, and applied in the *Educational Films Corporation* case. In the latter case, the New York statute involved imposed an annual franchise tax, payable both by domestic and foreign corporations, computed on the basis of the corporation's *entire net income for the preceding year.* The tax was challenged by a domestic corporation on the ground that included among such income was income from federal instrumentalities, namely, income from copyrights.* The tax was upheld on the

* In *Fox Film Corporation* v. *Doyal*, 286 U. S. 123 (1932), this Court, overruling *Long* v. *Rockwood*, 277 U. S. 142 (1928), held that copyrights were not federal instrumentalities.

ground that it imposed no real or direct burden on the Federal Government, the Court, per Mr. Justice Stone, saying (p. 389):

> "* * * While this Court, since *McCulloch* v. *Maryland*, 4 Wheat. 316, has consistently held that the instrumentalities of either government, or the income derived from them, may not be made the direct object of taxation by the other, * * * it has held with like consistency that the privilege of exercising the corporate franchise is no less an appropriate object of taxation by one government merely because the corporate property or net income, which is made the measure of the tax, may chance to include the obligations of the other, or the income derived from them. The constitutional power of one government to reach this permissible object of taxation may not be curtailed because of the indirect effect which the tax may have upon the other."

We submit that the *Educational Films Corporation* case is clearly distinguishable from the present case. In the first place, as pointed out above, we contend that the franchise exercised by appellant in the State of Alabama is not a legitimate subject of taxation by the State. No such question was involved in the *Educational Films Corporation* case.

But even if such franchise be assumed for the purpose of argument to be a legitimate subject of taxation, the tax in the present case, measured *solely* by property admittedly immune from taxation, is invalid because it does not merely incidentally and remotely affect imports, but directly affects them just as much as if it were levied against the imports themselves. We have shown above (p. 26) that if the measure adopted by a state for the purpose of deter-

mining the amount of a tax on the privilege of doing local business is such as in reality to impose a burden on interstate commerce, that measure cannot be constitutionally applied. We have also shown that no distinction can be made between interstate and foreign commerce in this respect. To sustain the measure of the tax, therefore, it must appear that there is a separation in the tax scheme between local business and interstate or foreign business (see cases cited at page 26 above). But the Court below, in the present case, has otherwise construed the statute in question, stating (R. 35):

> "The Tax Commission based the assessment upon the value of the nitrate on hand and in storage in Alabama on December 31, 1929, amounting in value to $712,846.72 * * *."

The result is that the tax, if sustained, will be measured solely by non-taxable imports. It is therefore submitted that this would constitute an unconstitutional burden on the right of appellant to sell in the original package the nitrate imported by it.

Moreover, in both the *Educational Films Corporation* and *Stone Tracy* cases, the tax was measured by general net income, only a part of such income being derived from tax exempt property. In the *Stone Tracy* case, Mr. Justice Day, delivering the opinion of the Court, said (p. 165):

> "It is therefore well settled by the decisions of this court that when the sovereign authority has exercised the right to tax a legitimate subject of taxation as an exercise of a franchise or privilege, it is no objection that the measure of taxation is found in the income produced *in part* from property which of itself considered is non-taxable. Applying that

> doctrine to this case, the measure of taxation being the income of the corporation from all sources, as that is but the measure of a privilege tax within the lawful authority of Congress to impose, it is no valid objection that this measure includes, *in part at least*, property which as such could not be directly taxed." (Italics ours.)

Thus in such cases the subject of taxation, otherwise immune, may be said to lose its immunity when the income therefrom is merged with general income. That this distinction is sound is shown quite conclusively by the fact that similar gross receipts or gross income taxes are uniformly held invalid.

Philadelphia & Southern Steamship Company v. *Pennsylvania*, 122 U. S. 326, *supra;*

Galveston, Harrisburg &c. Ry. Co. v. *Texas*, 210 U. S. 217 (1908);

Oklahoma v. *Wells, Fargo & Co.*, 223 U. S. 298 (1912);

Crew Levick Co. v. *Pennsylvania*, 245 U. S. 292, *supra;*

Northwestern Mutual Life Insurance Co. v. *Wisconsin*, 275 U. S. 136 (1927);

New Jersey Tel. Co. v. *Tax Board*, 280 U. S. 338 (1930).

See also: *United States Glue Co.* v. *Oak Creek*, 247 U. S. 321, 328, *supra;*

Fox Film Corporation v. *Doyal*, 286 U. S. 123 (1932).

In the present case, the tax, while not measured by gross receipts, nevertheless is graduated according to the

capital employed in the business taxed and, being measured solely by the value of the imports held in the original package for sale, is rather within the rule of the gross receipts cases than that of the cases involving net income. A general tax on all net income may not cause any unwarranted burden on any particular enterprise from which such income issues, whereas it is submitted that a tax measured in the manner employed in the present case has such an effect.

It may be urged on behalf of the State that in the present case this result is merely accidental and that, as stated by the Court below, the statute does not "indicate any purpose to in any manner interfere with imports or foreign commerce." We submit that this argument fails for the reason that a statute which has the necessary effect of taxing imports or the right of the importer to dispose of his goods is as much within the Constitutional prohibition as a statute which singles out as its object the prohibited subject of taxation.

> *Crew Levick Co.* v. *Pennsylvania,* 245 U. S. 292, 294, *supra;*
> *Kansas City, F. S. & M. R. Co.* v. *Botkin,* 240 U. S. 227, 231, *supra.*

The fact that the statute may not disclose an intention on the part of the legislature to reach a forbidden subject of taxation indicates at most that one possible vice in the statute does not exist. It does not indicate that the statute may not be otherwise objectionable.

In the present case, the necessary effect of the statute in question, as construed by the Court below, is to require appellant to purchase from the State of Alabama the privilege of selling the imported nitrate which has been guar-

anteed it by the Constitution and to pay for such privilege a tax measured by the imports on hand for sale. The practical effect of the tax is exactly the same as if the State of Alabama levied a direct tax of two dollars on each one thousand dollars in value of the nitrate maintained by appellant in the original package.

Conclusion

We are asking only that the Court apply to the case of an importer engaged exclusively in selling in the original package goods imported by it, the well-established rule that a state may not impose a tax upon a foreign corporation engaged exclusively in interstate or foreign commerce for the privilege or right to do business in the state. We urge that this doctrine is unquestionably applicable in the present case because of the rule laid down in *Brown* v. *Maryland, supra,* and repeatedly reaffirmed, that when the Constitution prohibits states from laying duties on imports, the prohibition extends not only to a tax upon the act of importing, but also to one upon the occupation of the importer. The tax in the present case, therefore, infringes both the imports and commerce clauses of the Constitution and cannot be sustained.

Although the foregoing is decisive of this case, we submit, further, that the tax in question is invalid because it is measured solely by non-taxable property, with no attempt in the tax scheme to separate local business from foreign commerce. Any such separation in the present case, of course, would result in no tax being imposed, since appellant is doing no local business in Alabama. In any event, therefore, the judgment of the Supreme Court of

Alabama should be reversed and the decree of the Circuit Court of Montgomery County, Alabama, affirmed.

Respectfully submitted,

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Elihu Root, Jr.,
Of Counsel.